



To: Members and Substitutes of the
Internal Market & Consumer Protection
Committee (IMCO) of the European
Parliament

25 March 2013

Dear IMCO Members and Substitutes,

RE: trilogue discussions on public procurement revision

In view of the ongoing trilogue negotiations on the revision of EU public procurement, BUSINESSEUROPE would like to share some important observations.

It is essential in the current climate for Europe to make use of every opportunity to rebuild its economy. Public procurement, accounting for approximately 18% of EU GDP, is vital in enabling European industry to grow stronger, more competitive and more efficient.

The main goal of public procurement must be to achieve efficiency in public spending and ensure the best economic value for taxpayers' money. This is even more relevant in the current economic downturn, which is putting a huge pressure on public finances and is, in many Member States, reducing the room for manoeuvre in delivering good public services and in providing infrastructure.

BUSINESSEUROPE has from the outset opposed a major overhaul of the current public procurement legislative framework and has urged the European institutions to ensure that any revision safeguards the principles of transparency, market openness and competitive tendering, which are vital for a healthy internal market.

We are therefore disappointed to see that these basic principles are being put at risk, giving way to unnecessarily complex legislation that will be difficult for suppliers and contracting authorities alike to apply in practice. This will not only be detrimental to companies but also to the quality of public services across Europe.

In addition, at a time when developing a stronger partnership with the private sector in providing good public services and infrastructure is essential, BUSINESSEUROPE is particularly concerned about the provisions on in-house and public-public co-operation as they risk distorting competition and could lead to the closing of an increasingly large number of markets to private enterprises.

More detailed views can be found in the enclosed annex.

We remain at your full disposal if you want to discuss these or other points further.

Yours sincerely,

Markus J. Beyrer

Annex: Specific concerns relating to trilogue discussions on revision of public procurement

Social aspects

The existing public procurement legal framework already allows for social considerations to be taken into account provided that they are linked to the subject matter of the contract, are proportionate to its requirements and as long as the principles of value for money and equal access for all EU suppliers are observed.

The reason for these basic conditions is that an imposition of social conditions unrelated to the concrete subject matter of the contract very easily leads to distortions of fair competition, obstacles to market access for bidders and the creation of new bureaucratic burdens and legal uncertainties for bidders, especially SMEs.

BUSINESSEUROPE is disappointed to see that the ongoing discussions on public procurement reform and especially some European Parliament proposals are putting the before-mentioned principles at risk, giving way to unnecessarily complex legislation that will be difficult for suppliers and contracting authorities alike to apply in practice.

Of particular concern is the proposal that contracting authorities may refer to factors linked to the production process in the technical specifications and in the award criteria. These may be of a social or an environmental nature. BUSINESSEUROPE fears that in practice the link with the subject matter will be lost and competition will be distorted leading to the favouring of local suppliers, which would threaten the internal market.

The same reasoning applies as to why it is not a good idea to include social aspects in the definition of life-cycle costs, as proposed by the European Parliament.

It is essential not to forget that there is now extensive EU legislation on social policy and European companies should respect relevant labour law provisions anyway. Whilst reaffirming BUSINESSEUROPE's support for the respect of human and labour rights, equal opportunities and social inclusion, it is crucial that the European legislators refrain from amending via the public procurement directives principles that are included in other pieces of legislation in force.

Under no circumstances must the public procurement directive include provisions that would contradict or interfere with the provisions of Directive 96/71/EC on the posting of workers. Also of concern are some European Parliament proposals regarding the application of ILO conventions. ILO conventions are instruments that are ratified by the member states and it is not up to the EU to impose observance of these conventions.

Aspects relating to the scope and exemptions

BUSINESSEUROPE is concerned about a specific regime being set up for social services with a higher threshold of 750.000 EUR, imposing only the respect of basic principles of transparency and equal treatment. This, if approved, would clearly create



significant obstacles for private operators to provide social services, many of which, including health services, also have a growing cross-border dimension.

BUSINESSEUROPE is also extremely concerned about the European Parliament's and the Council's stance on in-house and public-public co-operation. The current proposals of the European Parliament as well as the Council, if left unchanged, will lead to a distortion of competition and to the closing of an increasingly large number of markets to private companies.

In this context, BUSINESSEUROPE believes that in public-public/in-house situations, not being subject to the discipline and regulated competition of the public procurement rules, public authorities/public companies should:

- not be allowed to compete in the open market, as they would benefit from an unfair competitive advantage and restrict proper access to the market;
- only benefit from exclusions from EU procurement law in cases where they are 100% publicly owned and where 100% of their activities is dedicated to contracts from the public sector.

Should these provisions not be met, BUSINESSEUROPE would advocate the withdrawal of the provisions related to in-house/public-public relations. This applies to the revision of the public procurement directives as well as to the proposal for a stand-alone directive on concessions.

Subcontracting

Subcontracting is an essential way of allocating resources in an effective way and the relationship with subcontractors is primarily regulated by contract law.

BUSINESSEUROPE is against chain responsibility (joint and several liability). Such a liability scheme would shift the duty to enforce law from public authorities to companies and impose substantial costs and administrative burden on companies. Furthermore, such a liability scheme would be a hindrance to the free movement of services, lead to less competition and ultimately be disadvantageous for the taxpayer.

Governance

BUSINESSEUROPE believes that many of the intentions of the public procurement revision can be achieved by improving national enforcement of public procurement legislation.

National oversight bodies may be advisable for those member states where up until present there has not been a sufficient monitoring, implementation and control of public procurement. However, the rules must not force member states that already have efficient structures in place to create additional bodies, as this would lead to duplication of activities and to possible legal uncertainty.

In this context, BUSINESSEUROPE is concerned that the European Parliament and Council have watered down some of the provisions of the Commission's original proposal on governance, which would have been adequate for those countries where sufficient governance is still missing.

Reducing document requirements

BUSINESSEUROPE supports the European Public Procurement Passport, which would gather and standardise corporate information, leading thereby to a significant reduction in document requirements for European companies.

However, the ongoing trilogue discussions on this issue reveal that the Council has strong doubts about this concept. BUSINESSEUROPE believes that there is room for a compromise solution.

The revision of the public procurement directives introduces the possibility for economic operators to use self declarations, which in BUSINESSEUROPE's view will greatly reduce administrative burdens. Nevertheless, a standardisation of the documentation requirements asked in the self-declarations could be another leap forward in reducing administrative burdens and in lowering transaction costs for European businesses in public tenders.

Standardising these documentation requirements would not create new burdens for governments through the set-up of new government bodies or the use of complicated passport technology as that which would probably be entailed by the setting up of a European Public Procurement Passport. However, the member states' different legal frameworks should be carefully taken into account when taking this next leap towards standardisation.

It must be underlined that the list of documentation requirements included in the 'standardised formula' should only concern basic information describing the tenderer as an economic operator. The requirements should not include information that would affect on the criteria of the competition.

Further issues of importance

BUSINESSEUROPE believes that time limits for participations and submission of offers should not be fixed lower than those in the present procurement directives, as they are already very short. Any further shortening would risk that a considerable number of companies, among them especially SMEs, would abstain from participating in public procurement, and consequently the number of competitors would decrease, also to the disadvantage of public purchasers.

With regard to the modification of contracts during their term and their termination, BUSINESSEUROPE considers that Article 72.4 of the Commission's proposal (and Article 82.4 in the Utilities Directive), which states that a modification shall not be considered to be substantial where it is below 5% of the price of the contract, is excessively restrictive. In BUSINESSEUROPE's view that limit must be significantly



increased and the link with the thresholds set out in Article 4 (and Article 12 in the Utilities Directive) should be eliminated.

In this context, the Council's proposal to increase the limit of 5% (the Council proposes 10% for services and supply contracts and 15% for works contracts) can be welcomed. Nevertheless, the link with the thresholds set out in Article 4 should be deleted. This argument should also be taken into account in the proposal for a Directive on the award of concession contracts.

BUSINESSEUROPE supports the Commission's concept of self-cleaning. Given the serious legal uncertainty in this area, it is important to clarify that a company can regain reliability in spite of prior wrong-doing if it can demonstrate that it has taken appropriate measures to remedy the consequences of any illicit behaviour. BUSINESSEUROPE is concerned about modifications proposed in this area by the Council which would widely reduce the scope of application of the provision on self-cleaning thereby undermining its important function.

Finally, BUSINESSEUROPE would like to reiterate the importance of having clear and transparent conditions for identifying abnormally low tenders, with a view to fighting dumping offers in an effective, non-discriminatory manner.

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